

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

## PRESTON MOORE.

Petitioner.

Civil No. 08cv1207-LAB (WMC)

V.

STATE OF CALIFORNIA,

## Respondent.

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than September 9, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

In addition, a Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of California. See Rule 2(d), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted upon a court-approved form and in accordance with the instructions approved by the Court. Id.; S.D.CAL.CivLR HC.2(b). Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved form.

1        In addition, review of the Petition reveals that Petitioner has failed to name a proper  
 2 respondent. On federal habeas, a state prisoner must name the state officer having custody of  
 3 him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule  
 4 2(a), 28 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which the  
 5 petitioner is incarcerated.” Id. Federal courts lack personal jurisdiction when a habeas petition  
 6 fails to name a proper respondent. See id.

7        The warden is the typical respondent. However, “the rules following section 2254 do not  
 8 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the  
 9 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
 10 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
 11 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall  
 12 be the state officer who has official custody of the petitioner (for example, the warden of the  
 13 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

14        Here, Petitioner has incorrectly named “People of the State of California” as Respondent.  
 15 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas  
 16 corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual  
 17 person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v. Washington,  
 18 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts  
 19 upon the custodian of the state prisoner, the person who will produce “the body” if directed to  
 20 do so by the Court. “Both the warden of a California prison and the Director of Corrections for  
 21 California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d at 895. In order  
 22 for this Court to entertain the Petition filed in this action, Petitioner must name the warden in  
 23 charge of the state correctional facility in which Petitioner is presently confined or the Director  
 24 of the California Department of Corrections and Rehabilitation. Brittingham v. United States,  
 25 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

26        Further, the Court notes that Petitioner has not alleged exhaustion of his state court  
 27 remedies. Habeas petitioners who wish to challenge either their state court conviction or the  
 28 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.

1 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
 2 remedies, a California state prisoner must present the California Supreme Court with a fair  
 3 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
 4 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
 5 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
 6 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:  
 7 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
 8 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
 9 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
 10 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
 11 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
 12 in federal court, but in state court.” Id. at 366 (emphasis added). If Petitioner has raised his  
 13 claim in the California Supreme Court as a federal claim he must so specify. The burden of  
 14 proving that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d  
 15 1103, 1104 (9th Cir. 1981).

16 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 17 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 18 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation  
 19 period shall run from the latest of:

20 (A) the date on which the judgment became final by the  
 21 conclusion of direct review or the expiration of the time for seeking  
 such review;

22 (B) the date on which the impediment to filing an application  
 23 created by State action in violation of the Constitution or laws of the  
 24 United States is removed, if the applicant was prevented from filing  
 by such State action;

25 (C) the date on which the constitutional right asserted was  
 26 initially recognized by the Supreme Court, if the right has been  
 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

27  
 28 / / /

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

<sup>3</sup> 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

4 The statute of limitations does not run while a properly filed state habeas corpus petition  
5 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
6 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
7 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
8 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
9 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
10 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

11 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
12 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that  
13 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.  
14 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas  
15 relief because he has failed to name a proper respondent and has failed to allege exhaustion of  
16 state court remedies.

17 This action is **DISMISSED** without prejudice for failure to satisfy the filing fee  
18 requirement, failing to use a court-approved form, failing to name a proper respondent and  
19 failing to allege exhaustion of state court remedies. If Petitioner wishes to proceed with this  
20 action he must, **no later than September 9, 2008**, satisfy the filing fee requirement **and** file a  
21 First Amended Petition which cures the pleading defects identified in this Order. The Clerk of  
22 Court shall send a blank Southern District of California In Forma Pauperis Application and a  
23 blank Southern District of California amended petition form to Petitioner along with a copy of  
24 this Order.

IT IS SO ORDERED.

26 || DATED: July 11, 2008

Larry A. Bunn

**HONORABLE LARRY ALAN BURNS  
United States District Judge**